Supreme Court, U.S.
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No. 93-550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

J.Z.G. RESOURCES, INC.,

Petitioner,

vs.

SHELBY INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals properly exercised its discretion in raising, sua sponte, a companion issue concerning the Petitioner's proof of damages and whether said proof came within the Respondent's liability policy coverage.

2. Whether the Second Circuit Court of Appeals' denial of the petition for rehearing comported with Federal practice and procedure.

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COUNTER STATEMENT OF THE CASE

The District Court's order in limine addressed its restrictions of proof *solely* to Shelby's defenses on the issue of liability (A.27-28). Petitioner was neither limited in the nature nor the extent of evidence concerning any property damage it sustained.

The District Court trial proceeded over a four (4) day period. Petitioner produced seven (7) witnesses in presentation of its case (Appendix AA). The trial record revealed that Petitioner's counsel had full opportunity to offer proof of all damages

resulting from the faulty road construction. Contrary to Petitioner's claim of restricted proof in the District Court, its counsel in addressing the trial Court stated his intent to offer extensive evidence on damages (Appendix AA).

> "MR. SINGER: I have the same problem. Obviously, as a plaintiff, I want to put in as much evidence as I can to corroborate my client's damage claim."
>
> (Transcript pg. 496)

Petitioner's position in the Court of Appeals was succinctly stated on page 27 in its brief (Appendix BB):

> "The case at bar, on the other hand, consists of only one claim; to wit, damages to the subdivision roads and the entire award is solely to correct the negligent construction of same. There are no other categories of damage to be apportioned."

ARGUMENT

COURT OF APPEALS MAY EXERCISE DISCRETION TO RESOLVE QUESTIONS NOT RAISED BELOW WHERE THE OPPORTUNITY TO OFFER EVIDENCE ON THE ISSUE WAS AVAILABLE IN THE DISTRICT COURT

The Supreme Court has stated that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Court of Appeals, to be exercised on the facts of individual cases. We announce no general rule."

> *Singleton v. Wulff* (428 U.S. 106, 120, 96 S.Ct. 2868, 2877)

The Second Circuit Court has entertained a new argument not previously raised below (See, *Bornholdt v. Brady*, 839 F.2d 57, 68), and also declined to consider a new theory on appeal or to remand (See, *Gilbert v. Frank*, 949 F.2d, 637, 640).

In *Bornholdt*, supra, the Court stated:

> "At oral argument of this appeal, Bornholdt's counsel stated that the relation-back argument was in fact made to the district court during a conference; counsel for the Government did not deny that this had occurred but stated only that she could not remember whether or not it occurred. Plainly none of the facts pertinent to the relation-back argument is in dispute; only legal questions are at issue. In all the circumstances, we exercise our discretion, see *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976), to entertain the relation-back argument on this appeal."

In *Gilbert*, supra, the Court noted that:

> "The difficulty with Gilbert's present contention is that it was not the basis on which the case was tried in the district court.
>
> . . . . . .
>
> The issue not having been pursued by Gilbert in the district court and the court having conducted a seven-day trial on the case as Gilbert did present it, we decline to consider his new theory here or to remand to permit the case to be retried on that theory."

In this case, Petitioner had the opportunity and intent to marshal all evidence to prove its damages. Petitioner tried its case to recover damages resulting from faulty road construction. This position was reaffirmed in its brief on appeal.

Petitioner's attempt to reframe and re-litigate its damage claim should be rejected and the request for a remand denied.

CONCLUSION

By reason of the foregoing, Respondent requests that this Court deny the Petition for a Writ of Certiorari to review the Judgment of the Second Circuit Court of Appeals.

Respectfully Submitted,

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APPENDIX AA

APPENDIX AA

Excerpt from Trial Transcript Volume on Appeal Record in Second Circuit

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United States Court of Appeals
for the
Second Circuit

JZG RESOURCES, INCORPORATED,

Plaintiff-Appellee-Cross-Appellant,

– against –

EDWARD F. KING, and
SHELBY INSURANCE COMPANY,

Defendants-Appellants-Cross-Appellees,

C. JAMES OSBORNE, JR., and R.L.S., P.C.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TRANSCRIPT VOLUME

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The following excerpt is taken from page 496 of the Trial Transcript Volume on Appeal Record in the Court of Appeals below:

> "MR. SINGER: I have the same problem. Obviously, as a plaintiff, I want to put in as much evidence as I can to corroborate my client's damage claim."

APPENDIX BB

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Excerpt from Petitioner's Brief in the Second Circuit

United States Court of Appeals
for the
Second Circuit

JZG RESOURCES, INCORPORATED,

Plaintiff-Appellee-Cross-Appellant,

– against –

EDWARD F. KING, and
SHELBY INSURANCE COMPANY,

Defendants-Appellants-Cross-Appellees,

C. JAMES OSBORNE, JR., and R.L.S., P.C.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE-CROSS-APPELLANT

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The following excerpt is taken from page 27 of the Petitioner's Brief in the Court of Appeals below:

> "The case at bar, on the other hand, consists of only one claim; to wit, damages to the subdivision roads and the entire award is solely to correct the negligent construction of same. There are no other categories of damage to be apportioned."